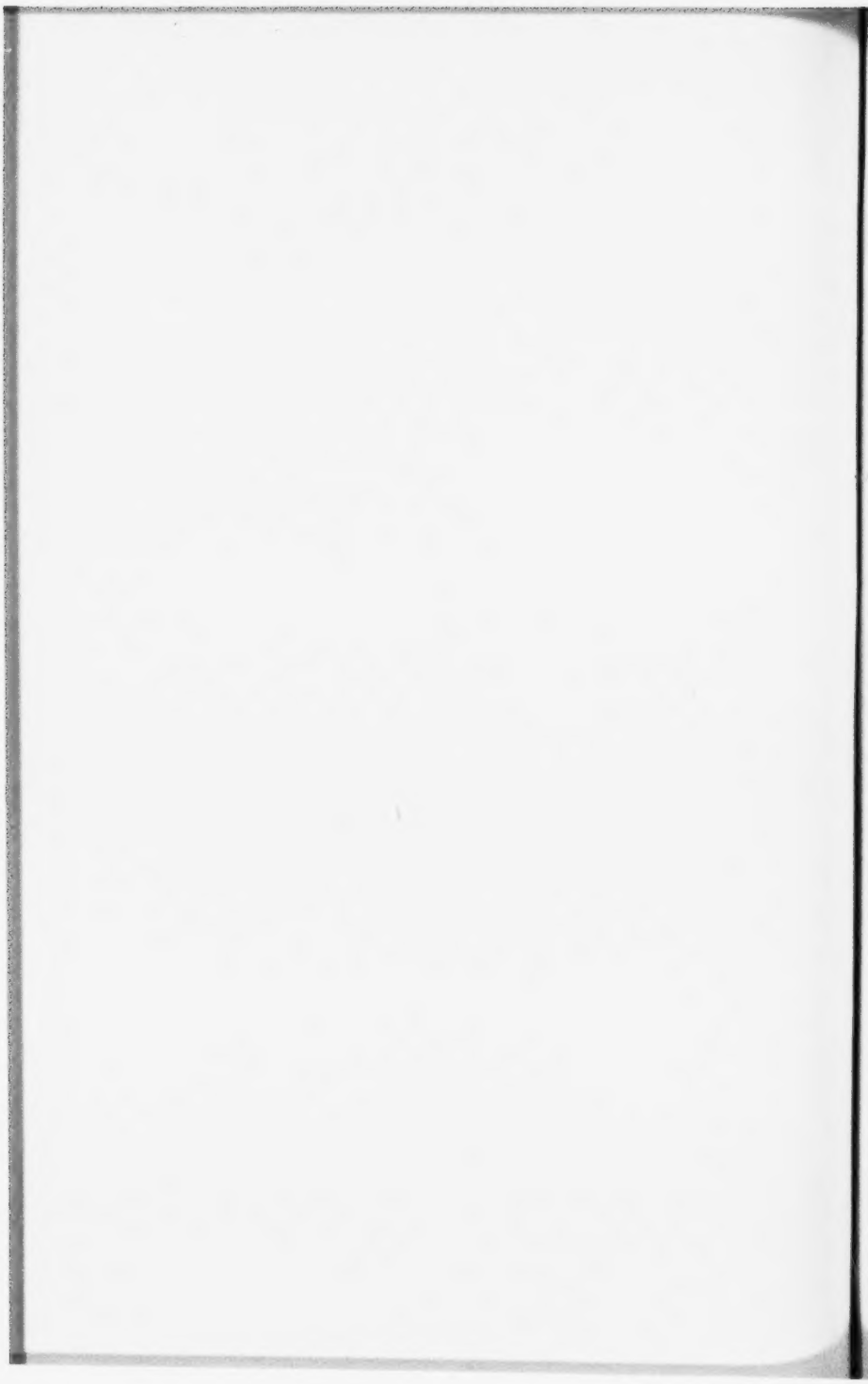

(26)

IN THE

Supreme Court of the United States

October Term, 1943.

No. 187

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of STEPHEN ROGALSKI,

Petitioner,

against

WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State of New York,
Attorney for Respondent,
The Capitol,
Albany, New York.

ORRIN G. JUDD,
Solicitor General,
Solicitor for Respondent.

WENDELL P. BROWN,
First Assistant Attorney-General,
EDWARD L. RYAN,
Assistant Attorney-General,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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MAY IT PLEASE THE COURT:

Now comes the respondent in the above entitled cause, by his counsel of record, and opposes the petition herein, and asks that the same be denied.

Statement of the Case.

The petitioner prays for a writ of certiorari to review the order of the Court of Appeals of the State of New York, entered April 22, 1943, in a proceeding upon a writ of habeas corpus.

The order of the Court of Appeals (R., p. 28) affirmed, without opinion, the order of the Appellate Division of the Supreme Court of New York (R., pp. 25-26), which affirmed, *Per Curiam*, the order of the Special Term of the Supreme Court (R., p. 4) dismissing the writ and remanding the relator. No opinion was rendered at the Special Term (R., p. 22).

The State's Statutes.

The pertinent part of Section 1898-a of the Penal Law of New York reads as follows:

> "§ 1898-a. *Weapons in automobiles; presumption of possession.*—
>
> The presence in an automobile, other than a public omnibus, of any of the following weapons, instruments or appliances, viz., a pistol, a machine gun, a sub-machine gun, a sawed-off shotgun, a black-jack, a slingshot, billy, sandclub, sandbag, metal knuckles, bludgeon, dagger, dirk, stiletto, bomb or silencer shall be presumptive evidence of its illegal possession by all the persons found in such automobile at the time such weapon, instrument or appliance is found. Where one of the persons found in such automobile possesses with him a valid license to have and carry concealed the pistol or revolver so found, and he is not there under duress, said presumption of unlawful possession shall not attach to the other persons found in the automobile."

Another section which must be considered on this application, since it states the crime for which petitioner was convicted, is § 1897 (4) of the Penal Law which reads as follows:

> "§ 1897. *Carrying and use of dangerous weapons*
>
> * * * * *
>
> 4. Any person over the age of sixteen years who shall have in his possession in any city, village or town of this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, without a written license therefor, issued to him as hereinafter prescribed, shall be guilty of a misde-

meanor, and if he has been previously convicted of any crime he shall be guilty of a felony."

ARGUMENT.

POINT I.

Petitioner was not convicted of a violation of Section 1898-A of the Penal Law of New York.

In his petition to this Court (P., p. 2), petitioner states, substantially, that the mittimus under which he is held is predicated upon a conviction rendered pursuant to Section 1898-a of the Penal Law of the State of New York, which statute, he urges, contravenes, violates and is repugnant to the Fourteenth Amendment to the Constitution of the United States.

He is in error. He was convicted of the crime of carrying a dangerous weapon as a felony.

People v. Rogalski, 256 App. Div. (N. Y.) 995; aff'd 281 N. Y. 581.

The mittimus (R., p. 11, fol. 32) states, in part:

"Indicted for Carrying a Dangerous Weapon, as a Felony, and convicted thereof, as charged, by the verdict of the Jury."

Appended to this brief and identified as Appendix "A" is a copy of the indictment under which petitioner was tried and convicted.

The relevant part of the indictment reads:

"THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CARRYING A DANGEROUS WEAPON, AS A FELONY, committed as follows:

"The defendants on July 2, 1938 in the County of Kings, being then over the age of sixteen years, had in their possession two loaded Revolvers of a size which

might be concealed upon the person, without a written license therefor."

The language of the indictment comprehends the crime prescribed by Section 1897, subdivision 4 of the Penal Law of New York, set out, *supra.*

POINT II.

Section 1898-A of the Penal Law of New York is a valid enactment of a rule of evidence. It is not violative of nor repugnant to the Fourteenth Amendment of the Constitution of the United States.

This section, quoted, *supra,* does not define a crime.

People ex rel. Dixon v. Lewis, 249 App. Div. (N. Y.) 464; aff'd 276 N. Y. 613.

In that case the petitioner for a writ of habeas corpus was detained by virtue of an information charging specifically a violation of Section 1898-a. In its opinion reversing the order of Special Term which dismissed the writ, the Appellate Division said (at page 466):

> "No crime had been committed in so far as known, and no crime was charged. *The information referred to no section of the Penal Law, except section 1898-a, and that section defines no crime.* And were it to be thought that the information was sufficient as a charge of crime under section 1897, still there was no claim that either of the relators had a pistol in his possession. The only charge was that they were in an automobile in which a pistol was found." (Emphasis supplied.)

The Court of Appeals, affirming the decision of the Appellate Division, stated in its memoranda of decision:

> "We do not, however, pass upon the constitutionality of section 1898-a of the Penal Law for the reason that the question cannot be reached on this appeal. *The information fails to state a crime.*" (Emphasis supplied.)

The section establishes a rule of evidence under which a presumption of illegal possession of certain weapons is established.

The State has power to prescribe the evidence which is to be received in the courts of its own government.

Fong Yue Ting v. United States, 149 U. S. 698, 729.

The Court of Appeals of New York on several occasions has sustained the validity of similar presumptions created by statute.

> Possession by a junk dealer of certain bottles or kegs shall be presumptive evidence of his unlawful use, purchase and traffic therein. (*People v. Cannon,* 139 N. Y. 32.)
>
> Possession of certain weapons by any person other than a public officer, concealed on his person, shall be presumptive evidence of carrying or concealing or possession with intent to use the same in violation of law. (*People v. Persce,* 204 N. Y. 397.)
>
> Possession by any person other than a public officer of certain papers used in carrying on, promoting or playing the "policy game" shall be presumptive evidence of possession thereof knowingly and in violation of law. (*People v. Adams,* 176 N. Y. 351, affd. 192 U. S. 585.)

It is well settled that a statute providing that proof of one fact shall be presumptive evidence of the existence of the ultimate fact in issue does not violate the due process clause of the Federal Constitution where there is some natural connection between the fact proved and the fact presumed, and the presumption is not conclusive or arbitrary or unreasonable.

People v. Cannon, supra.

People v. Adams, supra.

Such a presumption, it has been said, is merely "an administrative assumption or determination for procedural purposes" the truth of which is always open to rebuttal.

Welty v. State, 180 Ind. 411, 100 N. E. 73.

Affirming *People v. Adams, supra,* this Court in *Adams v. New York,* 192 U. S. 585 at pages 598, 599 stated:

> "It is further urged that the law of the State of New York, Penal Code, § 344b, which makes the possession by persons other than a public officer of papers or documents, being the record of chances or slips in what is commonly known as policy, or policy slips, or the possession of any paper, print or writing commonly used in playing or promoting the game of policy, presumption of possession thereof knowingly in violation of section 344a, is a violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives a citizen of his liberty and property without due process of law. We fail to perceive any force in this argument. The policy slips are property of an unusual character and not likely, particularly in large quantities, to be found in the possession of innocent parties. Like other gambling paraphernalia, their possession indicates their use or intended use, and may well raise some inference against their possessor in the absence of explanation. Such is the effect of this statute. Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only *prima facie* evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. Furthermore, it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government. *Fong Yue Ting v. United States,* 149 U. S. 698, 729."

The presumption created by Section 1898-a of the Penal Law is not conclusive. It does not relieve the State of the necessity of proving, beyond a reasonable doubt, the commission by a defendant of a crime to which the presumption attaches. It does not deprive a defendant of the protection

afforded by the due process clause of the Constitution of the United States. It merely shifts the burden of proof and calls upon a defendant to explain facts and circumstances peculiarly within his knowledge.

It is not arbitrary or unreasonable. Where the weapon involved is a pistol or revolver licensed in the name of one of the occupants of an automobile, the statute affords protection to other occupants in these words:

> "Where one of the persons found in such automobile possesses with him a valid license to have and carry concealed the pistol or revolver so found, and he is not there under duress, said presumption of unlawful possession shall not attach to the other persons found in the automobile."

The statute satisfies the test of rationality. There is a rational connection between the presence of an unlicensed pistol or revolver in an automobile and its possession by the occupants of the automobile. In a day when the automobile has been widely used by criminals as an aid in their illegal schemes, and has in fact become a frequent instrument of robbery and murder, it is reasonable to say that the unexplained presence of an unlicensed pistol in a car is evidence that it was in the possession of those who were using the car.

The conviction of Rogalski did not rest solely on the presumption created by Section 1898-a of the Penal Law. Testimony was produced showing that he had on his person two cartridges adaptable to use in the guns found in the automobile in which he was a passenger *(People v. Rogalski, supra)*. Thus, there can be no justifiable claim by the petitioner that he was convicted solely on the presumption created by the statute. Factual evidence was produced to strengthen the presumption. It was upon all the evidence that the Jury found the defendant guilty.

Petitioner, at pages 2 and 3 of his petition, urges, as a reason for the granting of the writ of certiorari, that there is confusion in the courts of New York State upon the question of the constitutionality of Section 1898-a of the Penal Law of New York.

Any confusion which may have existed has been eliminated by the decision of the Court of Appeals of New York in the present case *(People ex rel. Rogalski v. Martin,* 290 N. Y. (Mem.) 207; Advance Sheet No. 220, dated July 17, 1943). In his brief to the Court of Appeals, petitioner herein stated the sole question presented to that Court was the constitutionality of Section 1898-a of the Penal Law. The four cases cited by petitioner on page 3 of his petition are decisions of lower courts decided prior to the decision of the Court of Appeals herein.

CONCLUSION.

We respectfully submit that this cause presents no question sufficiently substantial to warrant review by this Court and urge that the petition be denied.

Dated: August 5, 1943.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the
State of New York,
Attorney for Respondent,
The Capitol,
Albany, New York.

ORRIN G. JUDD,
Solicitor General,
Solicitor for Respondent,
WENDELL P. BROWN,
First Assistant Attorney-General,
EDWARD L. RYAN,
Assistant Attorney-General,
Of Counsel.